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# **BRINGING PENANCE BACK TO THE PENITENTIARY: USING THE SACRAMENT OF RECONCILIATION AS A MODEL FOR RESTORING REHABILITATION AS A PRIORITY IN THE CRIMINAL JUSTICE SYSTEM**

JOHN CELICHOWSKI, O.F.M CAP.\*

## **INTRODUCTION**

In recent years, many Americans have become familiar with the names of places where the power of evil and the depths of human depravity have been revealed in their fullness: Littleton, Rwanda, Kosovo, Sierra Leone, and East Timor. Others, however, have experienced the shadows of the human soul in ways less graphic but more terrifyingly personal than the pages of the *New York Times* or the vivid imagery of CNN could ever convey. They have encountered these shadows in the form of crime in cities and suburbs, in neighborhoods and on highways, and in the workplace as well as in the home. They have endured

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crime in forms ranging from the scrawl of graffiti on the side of a store, to a vicious sexual assault and murder in the sanctuary of one's own home.

Criminal punishment for violations against persons or property is a reflection of what we, through our imperfect political and judicial processes, have deemed to be our shared values. The legal prohibition against murder, for example, expresses our professed and virtually universal concern for the value and integrity of human life. Our reverence toward property is expressed by the illegality of its theft. This is particularly true for private property.

The criminalization of "vices" such as prostitution is more controversial. For some, this represents the high value our society places on human sexuality and intimacy. For others, it reeks of patriarchy, paternalism, and repression. Although it is often denied, we can and do legislate morality. We go so far as to publicly condemn and sanction particular transgressions. As Lord Devlin suggested nearly thirty-five years ago, these public condemnations are necessary for our survival as a society:

What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. . . . For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.<sup>1</sup>

In the United States, that price can be steep economically, psychologically, and socially. The twenty-four hour news cycle and explosion of information sources, ranging from Fox TV's *America's Most Wanted* to the vaporous depths of cyberspace, have conspired to create a fear of crime and criminals that is as much a product of perception as it is a reflection of reality.<sup>2</sup> We

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<sup>1</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965), reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 160, 161 (6th ed.1995).

<sup>2</sup> See JULIAN V. ROBERTS & LORETTA J. STALANS, *PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE* 32 (1997). Roberts and Stalans note that:

Most people have a great deal of interest in crime and justice. However, this does not mean that they are necessarily that well-

have created a view of the world that is as dismal as it is distorted.<sup>3</sup> We have created our own *Harsh Realm*, a world of "virtual reality."<sup>4</sup>

Such "virtual reality" is belied by recent crime statistics. For example, the 1998 rates of violent crime victimization in the United States were nearly half the rates of 1973 for both white and black Americans.<sup>5</sup> Between 1990 and 1996, the nation's Total Crime Index and Violent Crime Index for those groups declined by 12.7% and 13.3%, respectively.<sup>6</sup> During this same period, however, large majorities of Americans in three separate surveys reported that they believed that the problem of crime was getting worse.<sup>7</sup>

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informed about the issues....The findings of opinion surveys in a number of countries demonstrate that the public have a poor idea of the nature or prevalence of crime.

*Id.*

<sup>3</sup> See *id.* ("The misperceptions of the public are neither random nor unrelated. For the most part, they reflect a cohesive, although distorted world of crime and criminal justice. It is a world in which crime rates are escalating dramatically, particularly rates of violent crime.").

<sup>4</sup> See *Harsh Realm* (Fox Network television broadcast, Fall 1999). In *Harsh Realm*, the lead character, who is the subject of an experiment, falls into a world of virtual reality marked by fear, violence, and death. The show was cancelled after airing only three episodes. See Jim Rutenberg, 'Realm' Reincarnated, N.Y. TIMES, Mar. 22, 2000, at E9.

<sup>5</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Serious Violent Crime Victimization*, at <http://www.ojp.usdoj.gov/bjs/glance/race.txt> html (last revised Mar. 18, 2000) (reporting serious violent crime victimization rates by race from 1973 to 1998). The survey showed that the rate of serious violent crime for whites was 20.0 (per 1000) in 1973 and 11.6 in 1998, a drop of 42%. See *id.* For blacks, the rate dropped from 37.3% in 1973 to 19.2% in 1998, a drop of 48.5%. See *id.* Serious violent crimes include homicide, rape, robbery, and aggravated assault. See *id.* See generally, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1997, (Kathleen Maguire & Ann L. Pastore eds., 1998) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS] (showing victimization statistics broken down into categories of: race, sex, and age).

<sup>6</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 285 tbl.3.120 (reporting changes in the "Total Crime Index Rates" and "Violent Crime Rates" in the United States from 1960 to 1996). The violent crime rate included "murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault." *Id.* The Total Crime Index included the aforementioned violent crimes plus the property crimes of "burglary, larceny-theft, and motor vehicle theft." *Id.* But see David A. Vise & Lorraine Adams, *Despite Rhetoric, Violent Crime Climbs*, WASH. POST, Dec. 5, 1999, at A3 (citing a study by the Milton S. Eisenhower Foundation noting, inter alia, that the rate of violent crime in major cities in 1998 was 40% higher than in 1969).

<sup>7</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 120

In the political world, of course, perception can become reality. Consequently, public perceptions, political posturing, and punitive public policies like the "War on Drugs" and determinate sentencing have mingled together to fuel a frenzy of incarceration and spending on prisons.<sup>8</sup> In 1996, polls conducted by the National Opinion Research Center reported that 67% of those surveyed thought that the nation spent too little on stopping "the rising crime rate,"<sup>9</sup> while 78% said that the courts in their area did not deal harshly enough with criminals.<sup>10</sup> Public support for capital punishment has seen a corresponding rise, and is now nearly twice as strong as it was in 1965.<sup>11</sup>

Furthermore, public spending on our justice system has risen steeply.<sup>12</sup> Between 1982 and 1993, total spending on the justice system at all levels of government (federal, state, and local) increased by 172.2%.<sup>13</sup> During the same period, spending on corrections rose by an even sharper 253.3%.<sup>14</sup> In 1982, state

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tbl.2.31-33 (indicating public attitudes toward crime levels in the United States). One of the surveys asked respondents, "Is there more crime in the U.S. than there was a year ago, or less?" *See id.* at 120 tbl.2.31. The percentage of those responding that there was more crime in 1990, 1992, and 1996 were 84%, 89%, and 71%, respectively. *See id.*

<sup>8</sup> *See* Judy Mann, *Make War on the War on Drugs*, WASH. POST, July 26, 2000, at C13 ("Our \$40 billion-a-year war on drugs has created more prisons, more criminals, more drug abuse and more disease.").

<sup>9</sup> *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 128-29 tbl.2.47 (indicating public "[a]ttitudes toward the level of spending to halt the rising crime rate"). Sixty-seven percent of those surveyed in 1996 said that the country was spending "too little" money on the problem, 7% said that the country was spending "too much," and 23% said that the amount the country was spending was "about right." *Id.*

<sup>10</sup> *See id.* at 134-35 tbl.2.50 (indicating attitudes people have concerning the severity of the courts in their area). While only 5% of those surveyed in 1996 believed that courts in their area dealt "too harshly" with criminals, and 11% said that criminals were treated "just right," 78% believed that courts in their area treated criminals "not harshly enough." *See id.*

<sup>11</sup> *See id.* at 138 tbl.2.56 (indicating public attitudes toward the death penalty). This table summarizes a Harris Poll survey that asked, "Do you believe in capital punishment, that is, the death penalty, or are you opposed to it?" *Id.* In 1965, 38% of those polled favored the death penalty, while 47% opposed it. *See id.* In 1997, 75% of those polled favored the death penalty, while opposition had dropped to 22%. *See id.*

<sup>12</sup> *See id.* at 3 tbl.1.2 (listing justice system expenditures by activity and by level of government from 1980 to 1983). The total justice expenditures included police protection, judicial and legal activities, and corrections activities. *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

governments spent over \$5.5 billion on corrections activities.<sup>15</sup> By 1993, this amount exceeded \$19 billion.<sup>16</sup>

A significant amount of the increase in public spending on the justice system is attributable to what has come to be known as the "War on Drugs." In 1997, the federal government spent over \$15 billion to control illegal drug trafficking and use.<sup>17</sup> Nearly \$2.4 billion of that amount went to the Department of Health and Human Services, while the Department of Justice received over \$6.7 billion.<sup>18</sup> In 1980, U.S. district courts sentenced 3,479 people convicted of violating federal drug laws.<sup>19</sup> In 1997, the number of convictions rose to 19,833, representing an increase of 570%.<sup>20</sup>

In 1997, nearly 5.7 million American adults were under the supervision of the criminal justice system, of which, nearly 1.2 million were in prison.<sup>21</sup> In 1992, the United States imprisoned people at a rate 37% higher than that of South Africa and more than four times higher than that of England (including Wales) or Canada.<sup>22</sup> The incarceration rate in the United States, in 1995, was second in the world only to that of Russia.<sup>23</sup> As with many other barometers of social and societal dysfunction, racial

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<sup>15</sup> See *id.* at 11 tbl.1.9 (listing direct expenditures on "correctional activities" by State governments and reporting percent distribution of those funds).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 17 tbl.1.14 (listing "federal drug control funding" by federal agency in 1997 and 1998).

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 414 tbl.5.37 (reporting the number of defendants that were sentenced in U.S. District Courts for violating drug laws, by type and length of sentence).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 464 tbl.6.1 (reporting number of adults "on probation, in jail or prison, and on parole" from 1980 to 1997). In 1997 there were 5,690,700 adults under the supervision of the criminal justice system. See *id.* Of the correctional population: 3,261,888 adults were on probation, 1,185,800 adults were imprisoned, 685,033 adults were on parole, and 557,974 adults were jailed. See *id.*

<sup>22</sup> See Norval Morris, *The Contemporary Prison*, in THE OXFORD HISTORY OF THE PRISON 227, 237 (Norval Morris & David J. Rothman eds., 1995) [hereinafter HISTORY OF THE PRISON]. Norval noted that the comparative incarceration rates per 100,000 of population were 455 for the United States, 332 for South America, 109 for Canada, and 98 for England and Wales. See *id.* These rates combined those in prison and in jail for the purpose of international comparisons. See *id.*

<sup>23</sup> See Edgardo Rotman, *The Failure of Reform*, in HISTORY OF THE PRISON, *supra* note 22, at 169, 195 ("The U.S. rate of incarceration today (519 per 100,000 population) is second in the world, after Russia.").

minorities are disproportionately affected. In 1995, one out of eleven black adults in the United States were under correctional supervision, compared with only one in fifty white adults.<sup>24</sup>

### I. AN OPPORTUNITY TO RECONSIDER REHABILITATION

There are four traditional justifications for punishment through the criminal justice system: deterrence, incapacitation, rehabilitation, and retribution.<sup>25</sup> There is a widespread assumption that, as public concern and frustration over crime have grown, rehabilitation has receded as a justification for criminal punishment, while the other three—particularly retribution and incapacitation—have advanced. This belief is perpetuated by the stereotypes of murderers, rapists, and other violent offenders as living a “privileged” life behind bars, where they are provided with such amenities as cable TV, weight lifting facilities, and the opportunity to study in the prison library in order to draft frivolous appeals. These stereotypes are, of course, far from the dull, anxious, and sometimes brutal reality of a maximum-security facility such as Stateville Prison near Joliet, Illinois.<sup>26</sup> As one prisoner described the situation:

Prison life is really nothing like what the press, television, and movies suggest. It is not a daily round of threats, fights, plots, and “shanks” (prison-made knives)—though you have to be constantly careful to avoid situations or behavior that might lead to violence. A sense of impending danger is always with you; you must be careful to move around people rather than against or through them, but with care and reasonable sense you can move safely enough. For me, and many like me in prison, violence is not the major problem; the major problem is monotony. It is the dull sameness of

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<sup>24</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 464 tbl.6.2 (estimating the “number and percent of adults under correctional supervision” by sex and race in the United States from 1985 to 1995). In 1995, the percentage of black adults reportedly under correctional supervision was 9.3%, compared with 2.0% of white adults. See *id.* The figures for 1985 were 5.2% and 1.2%, respectively. See *id.*

<sup>25</sup> See generally KADISH & SCHULHOFER, *supra* note 1, at 101–53 (discussing the four traditional justifications for punishment).

<sup>26</sup> See, e.g., Morris, *supra* note 22, at 228–36 (featuring *One Day in the Life of #12345*, a “diary” entry by a Stateville inmate, which depicts a typical day of prison life as monotonous and dull).

prison life, its idleness and boredom, that grinds me down. Nothing matters; everything is inconsequential other than when you will be free and how to make time pass until then.<sup>27</sup>

Despite the misperceptions perpetuated by the media and the rhetoric of those who proclaim the need to be “tough on crime,” rehabilitation—at least as an ideal—is surprisingly resilient. In a 1996 survey conducted by the College of Criminal Justice at Sam Houston State University, pluralities and sometimes majorities of respondents—regardless of gender, race, age, education, income, political affiliation, or any other demographic characteristic—consistently chose rehabilitation over punishment and crime prevention/deterrence as “the most important goal of prison.”<sup>28</sup> It should be noted that *none* of the twenty-eight demographic subgroups listed in the survey registered more than 19% support for punishment as the primary goal of incarceration.<sup>29</sup>

This collective cognitive dissonance among “tough on crime” pronouncements and policies, public misperceptions of increasing crime, and the apparent unfulfilled public appetite for rehabilitation may help explain why public confidence in local court and state prison systems is, at best, modest.<sup>30</sup> Increasingly harsh and dehumanizing forms of punishment, including determinate and “no parole” sentences, the expansion of capital punishment to cover an ever-increasing array of crimes, and the construction of “supermax” prisons, have not brought a concomitant peace of mind to America. Ironically, they have

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<sup>27</sup> *Id.* at 228.

<sup>28</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 137 tbl.2.53 (indicating public attitudes toward “the most important goal of prison”). The survey showed that respondents ranging from Blacks, to urban dwellers, and college graduates expressed the strongest support for rehabilitation as “the most important goal of prison.” See *id.* By contrast, support for punishment as the primary goal of imprisonment was strongest among people ages 18–24, those living in small cities, and high school graduates. See *id.* Hispanics, Republicans, and high school graduates, most heavily favored the primary goal of crime prevention/deterrence. See *id.*

<sup>29</sup> See *id.* The group registering the highest support for punishment as the primary goal of imprisonment was individuals with an annual income of less than \$15,000 (18.6%).

<sup>30</sup> See *id.* at 112 tbls.2.21, 2.22. These surveys reported the level of confidence in local court systems and state prison systems in 1996. See *id.* In neither survey did a majority or even a plurality in any demographic subgroup express “a great deal” or “quite a lot” of confidence in these systems. See *id.*



been accompanied by a rise in the popularity of automobile security measures such as "The Club," home security systems, and gated communities. America, like its prisons and inmates, is increasingly on "lock-down."

Perhaps this should not be so surprising. According to the Bureau of Justice Statistics, "[o]f the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within [three] years, 46.8% were reconvicted, and 41.4% returned to prison or jail."<sup>31</sup> It seems as if we are reaping our own modern form of biblical justice:

Stop judging and you will not be judged. Stop condemning and you will not be condemned. Forgive and you will be forgiven. Give and gifts will be given to you; a good measure, packed together, shaken down, and overflowing, will be poured into your lap. For the measure with which you measure will in return be measured out to you.<sup>32</sup>

Our increasingly costly criminal justice system, particularly our prisons, has failed to do more than incapacitate and exact the proverbial retributive eye, tooth, or life<sup>33</sup> from the condemned. Even as statistics suggest that there is less crime, with corresponding lower rates of unemployment and poverty, our nation still suffers from an abiding sense of collective insecurity. At the same time, we are enjoying a period of historically unparalleled economic prosperity and an increase in the availability of public resources. There is still a surprisingly strong faith in seeing rehabilitation as both a worthy and a primary goal of imprisonment.<sup>34</sup>

This confluence of factors makes this an opportune time to revisit the issue of rehabilitation and to restore it as a priority;

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<sup>31</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *Criminal Offenders Statistics*, at <http://www.ojp.usdoj.gov/bjs/cromoff.html> (last revised Mar.18, 2000).

<sup>32</sup> *Luke* 6:37-38.

<sup>33</sup> These references are from what has come to be known as the *lex talionis*, reflected in *Deuteronomy* 19:21. "Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!" *Id.*

<sup>34</sup> See Kent Greenawalt, *Punishment*, 4 *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 1336, 1340-41, reprinted in JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 24, 25 (1997) ("Punishment may help to reform the criminal so that his wish to commit crimes will be lessened, and perhaps so that he can be a happier, more useful person.").

primarily as a policy goal, but also as an ideal. This paper will contend that a way to do this is to recover the sense that prison is a place for conversion; in short, to put penance back into the penitentiary. The paradigm suggested is drawn from my own Roman Catholic tradition: the Sacrament of Penance (Reconciliation). This paper will demonstrate how this sacramental model may be used to develop criminal justice principles and policies that will renew rehabilitation as a viable justification for punishment, while satisfying the others in a more humane manner.

## II. SIN, CRIME, AND THE PRISON AS THE LOCUS OF CONVERSION

Like the system of criminal justice that has created them, our prisons function like the protagonist's picture in *The Picture of Dorian Gray*.<sup>35</sup> They demonstrate what we would like to think and project about our values and ourselves as a society: the sacredness of human life, the sanctity of private property, and the importance of honesty, hard work, delayed gratification, etc. Our prisons also reveal the social ugliness we would rather ignore: racism, socio-economic stratification, the results of our public spending priorities, family disintegration, and other scars, bulges, and bruises on the collective American soul. Prison represents both the serious consequences of individual choices and the consequences involved in the mix of social, economic, historical, moral, political, and other contexts in which those same individual choices are exercised.

The Model Penal Code cites eight general purposes for its provisions on the sentencing and treatment of those who have been duly convicted of breaking the law.<sup>36</sup> Three of these purposes focus on what could be called administrative goals.<sup>37</sup> The other five purposes, however, address not only the personal responsibility of offenders but also the accountability of the institutions and, indirectly, the society that punishes them:

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<sup>35</sup> OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (Isobel Murray ed., 1974).

<sup>36</sup> See MODEL PENAL CODE § 1.02(2)(a)–(h) (1962).

<sup>37</sup> See MODEL PENAL CODE § 1.02(2)(f)–(h) (noting the need to “coordinate and harmonize” the efforts of courts and administrative authorities, to advance a scientific approach to sentencing and treatment, and to integrate responsibility for the administration of the prison system in a single department or agency).

(a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment; (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense; (e) to differentiate among offenders with a view to a just individualization in their treatment.<sup>38</sup>

Similarly, the Roman Catholic Church (Church) teaches that sin has both profound personal and indelible social dimensions. The *Catechism of the Catholic Church* defines sin as "an offense against reason, truth, and right conscience; it is failure in genuine love for God and neighbor . . . . It wounds the nature of man and injures human solidarity."<sup>39</sup> Sin is a crime against divine and natural law. Biblically, "[t]he concept of sin is first and foremost a religious concept, because all sin is ultimately against God, God's laws, God's creation, God's covenant, and God's purposes."<sup>40</sup> According to the *Catechism*,

[s]in is a personal act. Moreover, we have a responsibility for the sins committed by others when *we cooperate in them* . . . . Thus sin makes men accomplices of one another and causes concupiscence, violence, and injustice to reign among them. Sins give rise to social situations and institutions that are contrary to the divine goodness.<sup>41</sup>

In light of the social and personal dimensions of sin and the reality that prison is not only the reflection of its inmates but also the society that incarcerates them, there should be a renewed emphasis on rehabilitation both as a justification for punishment and as the central goal of prison. Engaging in an

<sup>38</sup> *Id.* at § 1.02(2)(a)–(e).

<sup>39</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1849, at 453 (U.S. Catholic Conference 1994) (1994) [hereinafter CATECHISM].

<sup>40</sup> HARPER'S BIBLE DICTIONARY 955 (1985).

<sup>41</sup> CATECHISM, *supra* note 39, ¶¶ 1868–69, at 457. In the Roman Catholic tradition, concupiscence, or "the tinder for sin" (*fomes peccati*), is the inclination to sin which is a consequence of the weakness and frailty inherent in human nature. See *id.* ¶¶ 1264, 1426, at 322, 358. Furthermore, the *Catechism* notes that cooperation in sin includes: direct and voluntary cooperation; "ordering, advising, praising or approving" of sin; failing to disclose or hinder sins where there is a duty to do so; and protection of evildoers. *Id.* ¶ 1868, at 457. These concepts are paralleled in criminal law offenses such as aiding and abetting, conspiracy, misprision, harboring a fugitive, etc. *Id.*

honest reflection of historical iniquities such as chattel slavery and Native American genocide and the more contemporary problems ranging from school violence to the lack of access to affordable health care provide ample evidence that the United States, like the Church itself, is on a pilgrim journey.<sup>42</sup> The success, or failure, of our prisons in achieving the task of rehabilitation is also a measure of our ongoing conversion as a society. Benjamin Rush, one of the signers of the Declaration of Independence, recognized during the wake of the Revolutionary War that this pilgrimage is an inherent and indelible element of the American experiment:

There is nothing more common than to confound the terms of the American Revolution with those of the late American war. The American war is over: but that is far from the case with the American Revolution. On the contrary, nothing but the first act of that great drama is closed.<sup>43</sup>

The restoration of rehabilitation as a viable and even as a primary goal of incarceration, then, involves a commitment to an integrated program of educational improvement, vocational development, and physical wellness, while also demanding a commitment to moral formation. The various elements of the Sacrament of Reconciliation provide a model for how this integrated process can achieve its goal.

### III. THE SACRAMENT OF PENANCE AND THE PROCESS OF REHABILITATION

#### A. Contrition

The Sacrament of Penance is composed of four basic parts: contrition, confession, the act of penance, and absolution.<sup>44</sup> Contrition is a *sine qua non* of the sacrament's efficaciousness. "The most important act of the penitent is contrition, which is

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<sup>42</sup> See VATICAN COUNCIL II, *Dogmatic Constitution on the Church (Lumen Gentium)*, ¶¶ 8, 48–51, in *THE DOCUMENTS OF VATICAN II*, 21, 22–24, 78–85 (Walter M. Abbott, S.J., ed. & Joseph Gallagher trans., Herder & Herder Ass'n Press 1966) (1964).

<sup>43</sup> THOMAS FLEMING, *LIBERTY! THE AMERICAN REVOLUTION* 355 (1997).

<sup>44</sup> See *Rite of Penance*, ¶ 6(a)–(d), in *THE RITES OF THE CATHOLIC CHURCH* 335, 344–46 (The International Commission on English in the Liturgy trans., Pueblo Publ'g Co. 1976) [hereinafter *Rite of Penance*].

'heartfelt sorrow and aversion for the sin committed along with the intention of sinning no more.'"<sup>45</sup>

It is safe to say that, when one thinks of those who dwell on the grim tiers of Sing Sing or Leavenworth, "heartfelt sorrow" and "aversion for the sin committed" are not the first emotions that come to mind. The cynical might even say that, for most prisoners, their deepest sorrow is reserved for getting caught. The Church's definition of contrition, however, is entirely consistent with a core purpose of criminal punishment—deterrence.

The great utilitarian philosopher Jeremy Bentham noted that the efficacy of deterrence is rooted in our animal nature:

Pain and pleasure are the great springs of human action. . . . In matters of importance every one calculates. . . . Happily, the passion of cupidity, which on account of its power, its constancy, and its extent, is most formidable to society, is the passion which is most given to calculation. This, therefore, will be more successfully combated, the more carefully the law turns the balance of profit against it.<sup>46</sup>

Apparently trusting in Bentham's logic, one-third of adults surveyed in 1996 cited deterrence/crime prevention as the most important goal of prison, which was substantially fewer than those who cited rehabilitation as the most important goal; but more than twice as many as those who regarded punishment as the most important goal.<sup>47</sup> Inherent in the logic of deterrence is the belief that the harsher the punishment suffered, the stronger the deterrent effect.

In Virginia, for example, Attorney General Mark Earley has urged his peers in other states to adopt Project Exile, which imposes an automatic five-year prison term for those convicted of felonies, drug dealing, illegal drug abuse, or domestic violence.<sup>48</sup>

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<sup>45</sup> *Id.* ¶ 6(a), at 345.

<sup>46</sup> JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW*, Pt.II, bk.1, ch.3, *reprinted* in KADISH & SCHULHOFER, *supra* note 1, at 115, 115–16.

<sup>47</sup> *See supra* notes 28–29 and accompanying text; *see also* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 137 tbl.2.53 (indicating public "[a]ttitudes toward the most important goal of prison"). Rehabilitation was the most important goal of prison for 48.4% of those surveyed, while 33.1% said that deterrence/crime prevention was most important goal, and just 14.6% cited punishment as the primary goal. *See id.*

<sup>48</sup> *See Attorney General Urges National Expansion of Project Exile;*

Citing a 33% drop in the homicide rate in Richmond since 1998, Mr. Earley asserted, "These programs have successfully communicated a strong message in Virginia: an illegal gun will get you five years in prison, with no bond, no deal and no parole."<sup>49</sup>

There are, however, other statistics that contradict the assumption that more severe criminal penalties will necessarily deter crime. A Bureau of Justice Statistics study of eleven states, conducted at the height of the "tough on crime" Reagan Era, found that 62.5% of persons released from prisons in 1983 were rearrested within three years, and 41.4% of those released returned to prison or jail during that period.<sup>50</sup>

Because there is ample evidence to both refute and deny the deterrent effects of harsher sentences, it seems best to focus less on the effects of deterrence and more on its *purpose*. It is here that the concept of contrition is most useful. The *Rite of Penance* suggests that contrition is the expression of *metanoia*, or a change of heart, "a profound change of the whole person."<sup>51</sup>

What implications might this have for our criminal justice system? First, it would transform the purpose of deterrence from an end in itself to a means toward a different end and another purpose of punishment—rehabilitation. Second, it would demand that our society reshape some of its attitudes toward criminals. It has become almost routine to hear those accused of heinous crimes referred to as "animals" by prosecutors, politicians, and victims' families. When one considers vicious and hate-inspired murders like those of James Byrd, Jr. and Matthew Shepard,<sup>52</sup> it is hard to resist that temptation.

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*Partnership with U.S. Attorneys Could Reduce Crime in Major Metropolitan Areas*, PR NEWSWIRE, Nov. 9, 1999.

<sup>49</sup> *Id.*

<sup>50</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *Special Report: Recidivism of Prisoners Released in 1983*, at <http://www.ojp.usdoj.gov/bjs/abstract/rpr83.htm> (last revised Aug. 12, 1998).

<sup>51</sup> *Right of Penance*, *supra* note 44, ¶ 6(a), at 345 (internal quotations and citation omitted).

<sup>52</sup> See Adam Clymer, *Federal Law on Hate Crimes is Scheduled for Vote in the Senate*, N.Y. TIMES, June 20, 2000, at A17 (discussing the murders of James Byrd, Jr., and Mathew Shepard). Mr. Byrd, an African-American, was dragged to death behind a pick-up truck by three white men, two of whom belonged to white-supremacy groups. See *id.* Mr. Shepard, a gay college student in Wyoming, was beaten to death by two young men. See *id.* Their widely-reported murders have helped to spur congressional efforts to pass laws that provide

While such a vision of criminals is not only facile but also entirely consistent with Bentham's understanding of human nature in his consideration of deterrence,<sup>53</sup> it also poses some dangers. In a culture where "if it bleeds, it leads" are the watchwords for many local newscasts, and where shows like *Cops*, *Amazing Police Chases*, and *America's Dumbest Criminals* proliferate, it may become too easy to think of those convicted of crimes as lower forms of life and forget that they are someone's child, sibling, spouse, or parent. Creating institutions like "supermax" prisons in which those incarcerated are kept in their cells for twenty-three hours a day reveals not only society's revulsion at their conduct but also its own contempt for human life. If one was indeed "an animal" entering such an institution, it is hard to imagine how they could help but become even more feral.

It is not the criminal justice system's treatment of adult offenders that is most alarming in this regard, but rather the treatment of young people. Recently, a Michigan prosecutor, using a relatively new state law, tried a thirteen year-old boy, with a reported mental age of six, as an adult on charges of first-degree murder after he allegedly shot an older youth.<sup>54</sup> The defendant was eleven years old at the time of the shooting.<sup>55</sup> The jury found him guilty of second-degree murder after four days of deliberation.<sup>56</sup>

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specific penalties for "hate crimes," i.e., those motivated by animus against persons because of their race, ethnicity, nationality, gender, religion or sexual orientation. *See id.*

<sup>53</sup> *See supra* note 46 and accompanying text.

<sup>54</sup> *See* William Claiborne, *13-Year-Old Convicted in Shooting; Decision to Try Youth As an Adult Sparked Juvenile Justice Debate*, WASH. POST, Nov. 17, 1999, at A3. Not insignificantly, the article notes: "Prosecutors said they will recommend that [the convicted youth, Nathaniel Abraham,] be sent to a juvenile detention facility where he can receive counseling and rehabilitation." *Id.*; *see also* Dana Canedy, *Sentence of Life without Parole for Boy, 14, in Murder of Girl*, 6, N.Y. TIMES, Mar. 10, 2001, at A1 (explaining that a fourteen year old boy was sentenced to life in prison without parole, even in the face of requests for leniency by both the defense and the prosecution). Lionel Tate, 14, was found guilty of first-degree murder. The judge imposed the maximum sentence, even though the prosecution requested leniency. Interestingly, the prosecution offered a plea bargain to Tate, whose mother rejected it, which would have carried a punishment of only three years in a juvenile detention center, followed by ten years of probation. *See id.*

<sup>55</sup> *See* Claiborne, *supra* note 54.

<sup>56</sup> *See id.*

In 1972, 1.3% of juvenile offenders were referred into criminal or adult courts.<sup>57</sup> By 1996, that percentage had nearly quintupled to 6.2%.<sup>58</sup> The 1996 percentage might still seem low for the post-Columbine era until one looks at the raw numbers behind it: 81,520 juveniles taken into police custody were referred to adult or criminal courts, and those in small towns and suburban areas were significantly more likely than their counterparts in major urban areas to be so referred.<sup>59</sup>

The concept of contrition challenges us as a society to reflect on our attitudes toward those we incarcerate—young and old, men and, increasingly, women.<sup>60</sup> The degree to which we are willing to accept that they are capable of *metanoia* is a reflection of our own belief in the ability of not only human beings, but also their institutions to change. If we have come to accept that it is not only practically possible but ethically necessary, contrition demands that we develop and implement policies and invest in programs that can have an effect upon it. For example, those policies that make a change of heart viable and a change of life possible.

### B. Confession

In the Catholic understanding of conversion, however, contrition is just a starting point. Contrition alone is as futile as faith without works.<sup>61</sup> Confession, penance, and absolution are also necessary, both symbolically and practically, to be fully

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<sup>57</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 361 tbl.4.26 (reporting the “percent distribution of juveniles taken into police custody” and the dispositions of custodial situations from 1972 to 1996).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 360 tbl.4.25 (estimating the number of “juveniles taken into police custody” in 1996). The data revealed that approximately 4.0% of juveniles in cities with populations over 250,000 were referred to adult or criminal court, compared to 9.4% of those in cities of less than 10,000 and 7.5% of those in suburban areas. See *id.*

<sup>60</sup> See Terry Carter, ‘Equality with a Vengeance’: Violent Crimes and Gang Activity by Girls Skyrocket, 85 A.B.A.J. 22, 24 (Nov.1999).

Justice Department statistics show that since 1990 the number of women in state and federal prisons has doubled, and from 1980 to 1997 their numbers increased 478 percent, about twice the rate of men put behind bars....Between 1986 and 1991, the number of women in state prisons for drug offenses increased 433 percent, compared to 283 percent for men.

*Id.*

<sup>61</sup> See James 2:14–25.



reconciled—literally, reunited<sup>62</sup> with God and the Church. Within the Sacrament of Reconciliation, in and of itself, this link is most vividly demonstrated in the penitent's act of confessing his or her sins to the priest. The priest ministers to the penitent in the name of God and the Church, never forgetting that it is God alone who saves and that the Church is called to be a community of reconciliation.

In this context, of course, confession should be considered in a metaphorical rather than literal sense. It is interesting to note, however, that the word "confess" is synonymous with words like "acknowledge," "avow," "own," and "admit,"<sup>63</sup> and the vast majority of felony convictions—over three out of four at the federal level and nearly nine out of ten at the state level—are the result of guilty pleas.<sup>64</sup> Moreover, there are interesting parallels between the criminal law's analysis of the person as moral agent and the analysis of the Roman Catholic tradition.

With the exception of strict liability offenses,<sup>65</sup> each of the four levels of culpability noted in the Model Penal Code acknowledges the person as a conscious, moral decision-maker. This is most obvious with purpose/intent<sup>66</sup> and knowledge,<sup>67</sup> but

<sup>62</sup> See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 239, 977 (10th ed. 1997) (indicating that the word reconciliation is derived from the Latin *reconciliare*, *re* ("again") and *conciliate* ("to unite" or "to assemble")).

<sup>63</sup> ROGET'S II THE NEW THESAURUS 192 (3d ed. 1995).

<sup>64</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 392 tbl.5.16 (indicating that of the cases terminated in U.S. district courts, 43,584 of 56,480 or 77.2% of criminal offenses charged were disposed of through guilty pleas); *Id.* at 422 tbl.5.47 (indicating that 89% of felony convictions rendered in state courts were obtained through guilty pleas). It must be acknowledged, of course, that many such pleas are driven as much by strategic and systemic considerations as by ethical ones.

<sup>65</sup> See MODEL PENAL CODE § 2.05 (1962).

<sup>66</sup> See *id.* § 2.02(2)(a). This section states that:

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

*Id.*

<sup>67</sup> See *id.* § 2.02(2)(b). This section states that:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically

it is also central to the law's understanding of recklessness<sup>68</sup> and negligence.<sup>69</sup> As Professor Peter Arenella has noted:

The law assumes that two capacities of moral agency, the actor's practical reasoning ability and his ability to exercise causal power over his body and environment, give him the power to control his characteristic dispositions to act in a particular way. In short, the moral agent can make a rational choice at the time of the contemplated act to act inconsistently with those predispositions.<sup>70</sup>

The Church describes that uniquely human source of moral agency, the conscience, in similar terms:

Moral conscience, present at the heart of the person, enjoins him at the appropriate moment to do good and to avoid evil. It also judges particular choices, approving those that are good and denouncing those that are evil. . . . Conscience is a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed.<sup>71</sup>

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certain that his conduct will cause such a result.

*Id.*

<sup>68</sup> See *id.* § 2.02(2)(c). This section states that:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

*Id.*

<sup>69</sup> See *id.* § 2.02(2)(d). This section states that:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

*Id.*

<sup>70</sup> Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L.REV. 1511, 1573 (1992).

<sup>71</sup> CATECHISM, *supra* note 39, ¶¶ 1777–78, at 438 (footnotes omitted).

Rehabilitation in prison is not only the result of a prisoner's conscience; it is also the means by which that conscience can be developed. Consider, for example, a prisoner in an Ohio facility whose warden and director of educational programs are both graduates of criminal justice programs at Xavier University, a Jesuit-run institution in Cincinnati.<sup>72</sup> The prisoner, Joel, is serving a sentence of fourteen to fifty years for aggravated robbery. Although eighty-five percent of the inmates in Ohio's prisons do not have a high school diploma or its equivalent and an estimated twenty-five percent are functionally illiterate, the educational programs at the prison are only voluntary. Joel works in the prison greenhouse:

His tattooed forehead and drab blue uniform offer a stark contrast to a backdrop of bright purple orchids. "I love the natural world, flowers, insects . . . I also study world religions and literature." His goal is to read *The Iliad* and *The Odyssey* in Latin—he's already read the English translations. "Being in prison has been like college to me, a spiritual experience. I call it my monastery. I grew up in a good, religious family but got involved with drugs and robbed two banks. It's no one's fault but my own that I'm here."<sup>73</sup>

Joel might not fit the stereotype of the drug-addled, pitiless and predatory denizen of a close-security penitentiary, but his experience demonstrates the efficacy of rehabilitative programs that involve prisoners who are properly disposed to benefit from them. Given the increasing proportion of prisoners that are serving time for nonviolent drug offenses, it is reasonable to assume that there may be a lot more Joels in America's prisons. His confession of the responsibility for his criminal conduct and its consequent sanction is also significant. By acknowledging that his own actions brought him into prison, he empowers himself to make what could easily be a time of despair and personal destruction into an opportunity for human development. As the *Catechism* notes:

The confession (or disclosure) of sins, even from a simply human point of view, frees us and facilitates our reconciliation with others. Through such an admission

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<sup>72</sup> See Lisa Beckelhimer, *A Portrait of Prison Life*, XAVIER MAGAZINE, Summer 1999, at 19, 20.

<sup>73</sup> *Id.*

man looks squarely at the sins he is guilty of, takes responsibility for them, and thereby opens himself again to God and to the communion of the Church in order to make a new future possible.<sup>74</sup>

### C. Act of Penance

A new future begins to unfold as one engages in the act of penance. The Church explains that, "[t]rue conversion is completed by acts of penance or satisfaction for the sins committed [expiation for the sins committed], by amendment of conduct [amendment of life], and also by the reparation of injury."<sup>75</sup> These elements—expiation, amendment of life, and restitution—should not be unfamiliar. They are, after all, embodied in the notion that incarceration is part of the way in which the criminal "pays his debt to society."<sup>76</sup>

Contrary to popular belief, unfortunately reinforced by the, not entirely undeserved, stereotype of the newly-absolved penitent kneeling in a pew and droning dozens of "Our Fathers" and "Hail Marys"—the imposition of a penance is not a primarily punitive act but rather one of justice, mercy, empowerment, and restitution:

[T]his should serve not only to make up for the past but also to help him to begin a new life and provide him with an antidote to weakness. As far as possible, the penance should correspond to the seriousness and nature of the sins. This act of penance may suitably take the form of prayer, self-denial, and especially service of one's neighbor and works of mercy. These will underline the fact that sin and its forgiveness have a social aspect.<sup>77</sup>

The requirement that the penance correspond to the sin nicely parallels the traditional notion in criminal justice that the "punishment should fit the crime."<sup>78</sup> This ideal is commonly part

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<sup>74</sup> CATECHISM, *supra* note 39, ¶ 1455, at 365.

<sup>75</sup> *Rite of Penance*, *supra* note 44, ¶ 6(c), at 345–46.

<sup>76</sup> See Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 124 n.14 (1995); David Dolinko, *Foreword: How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 596 (1986); Lorraine Slavin & David J. Sorin, *Project: Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 534 (1984).

<sup>77</sup> *Rite of Penance*, *supra* note 44, ¶ 18, at 351.

<sup>78</sup> See Jaimy M. Levine, "Join the Sierra Club!": *Imposition of Ideology as a*

of the publicly stated rationale behind policies such as non-discretionary sentencing, "three strikes and you're out" laws, and the referral of juvenile offenders who have committed serious crimes into the adult criminal justice system.<sup>79</sup> These policies are additionally driven by considerations of administrative efficiency, the need for public officials to be perceived as "tough on crime,"<sup>80</sup> and in some cases the real need to address what are sometimes vexing discrepancies among jurisdictions regarding the adjudication of the same crimes.<sup>81</sup>

What the system gains in efficiency, perceived toughness, and fairness, however, it may also lose in flexibility, the ability to facilitate rehabilitation, and the capacity to fulfill what the Model Penal Code defines as two of the general purposes of sentencing and treatment of offenders: (1) "to differentiate among offenders with a view to *just individualization in their treatment*,"<sup>82</sup> and (2) "to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders."<sup>83</sup> Even in embracing the trend toward uniformity embodied in the federal sentencing guidelines<sup>84</sup> established by the Crime Control Act of 1984,<sup>85</sup> the federal courts are at least formally directed to recognize the legitimacy of those purposes.<sup>86</sup>

Despite examples of extraordinary judicial discretion, even

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*Condition of Probation*, 142 U.P.A.L.REV. 1841, 1844 (1994) (stating, "Sentencing courts often attempt to make the punishment fit the crime.").

<sup>79</sup> See Shari Del Carlo, Comment, *Oregon Voters Get Tough On Juvenile Crime: One Strike and You Are Out!*, 75 OR.L.REV. 1223, 1230 (1996).

<sup>80</sup> See Marc Mauer, *Why Are Tough on Crime Policies So Popular?: Despite the Promises of Political Leaders and Others Who Have Promoted Them as Effective Tools for Fighting Crime, "Tough on Crime" Policies Have Proved to be Costly and Unjust*, 11 STAN. L. & POL'Y REV. 9, 11 (1999).

<sup>81</sup> See, e.g., Michael Higgins, *Sizing Up Sentences*, 85 A.B.A.J.42-47 (Nov.1999) (noting, inter alia, the following ratios of prison sentences to convictions for white-collar crimes among various federal jurisdictions: W.D.Wisc. 8:10; S.D.Fla. 6:10; D.N.J. and D.Ariz. 3:10).

<sup>82</sup> MODEL PENAL CODE § 1.02(2)(e) (1962) (emphasis added).

<sup>83</sup> *Id.* § 1.02(2)(g).

<sup>84</sup> See 18 U.S.C. § 3553(a) (1994) (noting factors to be considered in imposing a sentence).

<sup>85</sup> See 28 U.S.C. §§ 991-998.

<sup>86</sup> See 18 U.S.C. § 3553(a)(1), (a)(2)(D) (stating that among the factors to be considered in sentencing are "the nature and circumstances of the offense and the history and characteristics of the defendant" and the need for the sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

in the face of determinate sentencing guidelines,<sup>87</sup> it is probably more accurate to say that the movement toward uniformity and greater severity in sentencing might have more to do with punishment fitting *a* crime rather than with punishment fitting *the* crime. Critics have argued that the new federal guidelines merely replace old disparities in sentences with new ones, can be very rigid, and may ultimately lead to sentences that are disproportionately severe.<sup>88</sup>

The humanity of the prisoner and the rehabilitation process are less noticeable but ultimately more devastating casualties of this trend. Prisons are already institutions of depersonalization and dehumanization. This is due to the prisons' emphasis on uniformity; a uniformity that is to some degree necessary. Life inside the penitentiary is very routine and can be numbingly monotonous.<sup>89</sup> Prisoners are known as often by their numbers as by their names. Commonly adopted expressions of individuality such as dress and hairstyles—even where religiously motivated—are limited, primarily for security reasons.<sup>90</sup> A uniform sentence, another added dimension of this reality, further reinforces the impression that the prisoner is more a thing to be processed than a person to be punished for the crime he committed. The prisoner is deterred from committing future crimes and given

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<sup>87</sup> See, e.g., *United States v. Johnson*, 964 F.2d 124 (2d Cir.1992). In *Johnson*, the Court of Appeals found that the trial court did not err in its statutorily permitted departure from uniform federal sentencing guidelines in reducing the sentence of the defendant. See *id.* at 130–31. The defendant was convicted of bribery arising from a kickback scheme involving fifteen V.A. hospital employees, which resulted in the theft of nearly \$90,000. See *id.* at 126. The trial court sentenced the defendant to six months of home detention followed by three years of supervised release and ordered restitution payments of nearly \$28,000, which represented a departure from sentencing guidelines. See *id.* The Court of Appeals concluded that the guidelines permitted such departures in light of “extraordinary family circumstances.” See *id.* at 128–29. In this case the defendant was a single parent and the sole support for her three young children, including the child of her institutionalized daughter. See *id.* at 129.

<sup>88</sup> See generally KADISH & SCHULHOFER, *supra* note 1, at 149–50.

<sup>89</sup> See *supra* notes 26–27 and accompanying text.

<sup>90</sup> See, e.g., *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir.1990) (stating that a prison regulation that did not permit inmates to wear their hair below their collars did not violate the free exercise rights of Native Americans, where the regulation was facially neutral, generally applied, and served a reasonable security interest); see also *Standing Deer v. Carlson*, 831 F.2d 1525 (9th Cir.1987) (reaching a similar result where a prison ban on inmate headgear was at issue).

opportunities to develop the internal and external resources he needs not only to avoid prison, but also to reintegrate himself into the community.

In the context of the sacramental metaphor, the prisoner's "debt to society"<sup>91</sup> is repaid on three levels: expiation (atonement), amendment of life (conversion), and restitution (making the injured whole).<sup>92</sup> Unfortunately, the popular view tends to be one-dimensional, and it focuses on expiation (from the Latin *expiare*, "to atone for").<sup>93</sup> This is probably best captured in the notion of "doing time." The time the prisoner spends behind bars is to have some rough correspondence to the severity of her crime. The Model Penal Code expresses this value when it notes that one purpose of sentencing and treating offenders is to safeguard them from "excessive, disproportionate or arbitrary punishment."<sup>94</sup> In other words, "the punishment should fit the crime."<sup>95</sup>

While this view of expiation adequately addresses the retributive and deterrent purposes of criminal punishment, it does not do justice to the rehabilitative dimension. The biblical understanding of expiation, however, is broader; it "tends to concentrate on the transgression itself and the issue of how it is to be removed, cleansed, and forgiven."<sup>96</sup> The removal of the criminal's transgression against his victim(s) and the cleansing of society is partially achieved by the removal and incapacitation of the transgressor himself. Capital punishment, although relatively rare, ultimately expresses this removal and cleansing.<sup>97</sup>

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<sup>91</sup> See Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 99, 123 (1996) ("The traditional metaphor ...is that by completing his punishment for all past crimes, a defendant has 'paid his debt to society.' If so, the ledger has been cleared and the state has no authority to intervene in his life ....").

<sup>92</sup> See *supra* note 75 and accompanying text.

<sup>93</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 409 (10th ed.1997).

<sup>94</sup> MODEL PENAL CODE § 1.02(2)(c) (1962).

<sup>95</sup> See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL.L.REV.383 (1995) ("Thus, the aphorism, 'let the punishment fit the crime,' intuitively describes justice."); see also *supra* note 78 and accompanying text.

<sup>96</sup> HARPER'S BIBLE DICTIONARY 292 (1985).

<sup>97</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 526 tbl.6.75 (reporting the "number of murders and nonnegligent manslaughters, persons under death sentence, executions, and other death sentence dispositions"). In 1996, there were 19,650 convictions for murder and non-

It must not be forgotten, however, that the vast majority of those imprisoned will be returned to society, often living again among those they victimized. The rate of persons in the parole population has risen significantly over the past two decades, nearly doubling between 1986 and 1996.<sup>98</sup> It is important that those who are paroled experience cleansing themselves for the desired cleansing to have lasting effects. This can occur through the next level of penance: amendment of life. The change of heart discussed earlier<sup>99</sup> is made concrete with a change of life.

Like the prodigal son of the biblical parable,<sup>100</sup> the prisoner must “come to” the decision to change. The parable clearly states that the son, who in his youth had squandered his inheritance, only came to his senses when he found himself in a pig sty in a distant land, envying even the scraps thrown to the pigs.<sup>101</sup> Those who claim that prison time should indeed be “hard time” hope that it will have a similar reawakening effect on those imprisoned.

The parable, however, underlines another critical element often neglected by “tough on crime” advocates. In order for one to truly “come to his senses,” one must not only see how bad his life is but also be able to envision a way back. He must also be provided with the opportunity and the means to do it. The prodigal son knew (or at least hoped) that he could return to his father’s house, where his life would surely be better even as a servant rather than a son, and with that confidence he set out on the long journey home.<sup>102</sup> A critical question for prison administrators and criminal justice policymakers is whether today’s prisons instill that same sense of hope in the hundreds of thousands of men, women, and children who are incarcerated. This demands a substantial investment of public resources:

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negligent manslaughter. *See id.* In that same year, 3,219 persons were sentenced to death and 45 executions were actually carried out under civil authority. *See id.* The ratio of persons receiving death sentences to those executed was thus 71.5:1. In 1986 it was 98.9:1 (1,781 death sentences, 18 executions). *See id.*

<sup>98</sup> *See id.* at 516 tbl.6.64 (reporting the “[r]ate (per 100,000 adult residents) of persons in the parole population”). In 1986, the rate of those on parole was 184. *See id.* By 1996, the rate had risen to 359. *See id.* The rates were calculated per 100,000 adult residents. *See id.*

<sup>99</sup> *See supra* Part III.A.

<sup>100</sup> *See Luke* 15:11–32.

<sup>101</sup> *See id.* at 15:13–18.

<sup>102</sup> *See id.* at 15:17–20.



Prisons nationwide spend \$30 billion a year not only to house and feed inmates, but to provide them with treatment, education and work. "People most often want to compare prison spending to education spending, and you can't. It's apples to oranges," said [a warden in the Ohio prison system]. The public wants us to lock inmates up and make them suffer, but they also want us to turn them into good citizens before they're released. You can't do all that without money."<sup>103</sup>

Imprisonment can be tough without being brutal and dehumanizing. While the increasingly popular military-style boot camp or shock incarceration programs, which are typically designed for young, first-time and/or non-violent offenders,<sup>104</sup> are designed to "break" participants, they do so for the purpose of building them back up, both individually and collectively.<sup>105</sup> Without rehabilitation—both as a deliberate policy and as a locus of public as well as personal investment—prisons may serve only to break people down and leave them crippled, if not destroyed, before they are released.

The third element of penance is restitution or rectification. It is in part a means of expiation, a way in which a penitent "may restore the order which he disturbed and through the corresponding remedy be cured of the sickness from which he suffered."<sup>106</sup> It is not fashionable, much less politically smart, to speak of the incarcerated as sick. It speaks too much of the much-maligned culture of victimhood and a therapeutic society.

The description of the criminal offender as ill, however, is both metaphorically apt and literally true. This illness is especially apparent in the high incidence of alcohol and other drug abuse among offenders.<sup>107</sup> According to the Bureau of Justice Statistics, nearly forty percent of adults on probation

<sup>103</sup> Beckelhimer, *supra* note 72, at 20.

<sup>104</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 81–83 tbl.1.76 (listing the "[c]haracteristics of shock incarceration programs" by state). By 1996, 32 of the 50 states, as well as the Federal Bureau of Prisons system, had adopted shock incarceration programs.

<sup>105</sup> See Richard Lowell Nygaard, *Is Prison an Appropriate Response to Crime?*, 40 ST. LOUIS U. L.J. 677, 690 (1996) (describing the boot camp rehabilitation process as a "death/rebirth" experience).

<sup>106</sup> *Rite of Penance*, *supra* note 44, ¶ 6(c), at 346.

<sup>107</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 473 tbl.6.13 (indicating levels of prior alcohol and drug use by adults on probation in 1995).

surveyed in 1995 reported that they were under the influence of alcohol at the time of their offense, and an additional thirteen and one-half percent reported that they were using drugs.<sup>108</sup> Among jail inmates surveyed in 1996, over thirty-five percent reported using drugs at the time of their offenses, nearly a third more than had reported such use in the same survey only seven years earlier.<sup>109</sup> Although it is important to distinguish the abuse of alcohol and other drugs from the disease of addiction, they are not unrelated.<sup>110</sup>

Addiction, of course, is not the only disease that affects people in the criminal justice system.<sup>111</sup> In 1995, U.S. prisons reported that nearly 25,000 (roughly one out of fifty) of those incarcerated were known to be HIV positive.<sup>112</sup> Despite the presence of such serious and, in some cases, highly communicable diseases, spending on health care in corrections systems can vary widely among states, from three percent to thirty-three percent of total corrections budgets, with a median of about nine percent.<sup>113</sup>

Real wellness, of course, has dimensions beyond physical

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<sup>108</sup> See *id.* In 1995, 39.9% of adults on probation admitted that they were under the influence of alcohol at the time of their offense, while 13.5% admitted that they were under the influence of drugs at the time of their offense. See *id.*

<sup>109</sup> See *id.* at 485 tbl.6.31 (reporting the percentage of jail inmates who have admitted using drugs in 1989 and 1996). In 1996, 35.6% of inmates reported that they were under the influence of drugs at the time of their offense, compared to 27.0% in 1989, an increase of 31%. See *id.*

<sup>110</sup> See, e.g., NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (NIAAA), ALCOHOLISM: GETTING THE FACTS, 1-5 (1996). The NIAAA distinguishes alcoholism or "alcohol dependence syndrome," from alcohol abuse in that the former is "a disease" marked by the symptoms of craving, loss of control, physical dependence and tolerance. See *id.* at 2. Alcohol abuse, by contrast, does not present the same symptoms; rather, it is "a pattern of drinking" in which causes one or several significant disruptions in regular life activities and relationships. See *id.* at 4. "While alcohol abuse is basically different from alcoholism," the NIAAA cautions, "it is important to note that many effects of alcohol abuse are experienced by alcoholics." *Id.*

<sup>111</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 523 tbl.6.71 (reporting the number of "State and Federal prisoners known to be positive for the human immunodeficiency virus (HIV) and confirmed AIDS cases").

<sup>112</sup> See *id.* In 1995, there were 5,099 confirmed AIDS cases among prisoners nationwide.

<sup>113</sup> See *id.* at 13 tbl.1.11 (listing the "[d]epartment of corrections' budgets and health care expenditures" by jurisdiction in 1986). Utah reported the high of 33%, while Wisconsin reported the low of 3%. See *id.* The Federal Bureau of Prisons reported that 14.3% of its budget was spent on health care. See *id.*

health. It involves the whole person—emotionally, mentally, spiritually, and physically. Statistics compiled earlier this decade revealed that less than sixty percent of those incarcerated in the nation's state prisons and jails had a high school diploma or its equivalent.<sup>114</sup> Therefore, it is not surprising that in 1996 approximately 97,000 prisoners were enrolled in Adult Basic Education (ABE) classes and 35,000 prisoners were enrolled in General Equivalency Degree (GED) programs, while approximately 15,000 prisoners were enrolled in 2-year degree programs and only 1,500 prisoners were enrolled in 4-year degree programs.<sup>115</sup>

At first glance, those figures might seem heartening given the relative educational deficits of offenders as group. It is sobering to realize, however, that in the same year the total number of state prisoners enrolled nationwide in ABE and GED programs was less than the state prison population in California and only slightly more than the prison population in Texas.<sup>116</sup> Even more sobering is the prospect that an estimated 400,000 inmates probably needed such services, roughly three times more than actually received them.<sup>117</sup> The educational component of rehabilitation clearly has room for further development.

Just as the rehabilitation process can be a form of healing, restitution can be one of the medicines. In fiscal year 1996,

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<sup>114</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *Criminal Offenders Statistics*, at <http://www.ojp.usdoj.gov/bjs/cromoff.html> (last revised Mar. 18, 2000) (stating that in 1991, 59% of all state prison inmates and 54% of all jail inmates had a high school diploma or its equivalent).

<sup>115</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 508 tbl.6.55 (listing the number of "[p]risoners in State and Federal correctional facilities enrolled in education programs" by jurisdiction in 1996).

<sup>116</sup> See *id.* at 492 tbl.6.37 (listing the number of "[p]risoners under jurisdiction of State and Federal correctional authorities" by jurisdiction in 1996 and 1997). The populations in the California and Texas prison systems were 146,049 and 132,383, respectively. See *id.* In comparison, the combined enrollment in state prison ABE and GED programs is approximately 134,000. See *supra* note 115 and accompanying text.

<sup>117</sup> The estimate of 400,000 inmates needing ABE/GED services was determined by multiplying the percentage of inmates who had at least a high school diploma or its equivalent (59%), see SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 508 tbl.6.55, by the total number of state prison inmates (1,077,624). See *id.* at 492 tbl.6.37. The resultant figure (635,798) was then subtracted by the total number of inmates to yield 441,826, which was rounded down to yield the conservative estimate of 400,000 to take account of the any improvement in the aggregate educational achievement level of prison inmates between 1991 and 1996. See *id.*

federal district courts imposed restitution as part of a sentence in one out of six criminal cases.<sup>118</sup> This was, as expected, most common in the case of property offenses.<sup>119</sup> Yet, restitution was also surprisingly prevalent in violent crimes.<sup>120</sup> Restitution is commonly understood as the way in which the offender attempts to compensate her victim(s) and, less directly, the community that has been injured by her conduct. In other words, it is the way in which she attempts to “make them whole.”<sup>121</sup>

The way in which restitution can help to make the offender whole may be less appreciated. In this regard, the experiences of the inmates at Warren Correctional Institution are instructive:

Community service projects enable inmates to donate time to government, nonprofit and charitable organizations. Warren’s projects include everything from packaging test tubes for school science classes to silk-screening T-shirts for the Boy Scouts. Prisoners in the Rover Rehab program train dogs from the county pound to be adopted as pets. “When we first brought dogs into the prison there were guys who started crying,” says Bergamo [the warden]. “They hadn’t pet a dog in 20 years.”<sup>122</sup>

#### *D. Absolution*

The final stage of the penitential/rehabilitative process proposed by this paper is absolution. Without delving into the theological intricacies—and controversies—the concept can engender, it is enough to say here that absolution is essentially and act of restoration and reintegration. Sacramentally:

Through the sign of absolution God grants pardon to the sinner who in sacramental confession manifests his change of heart to the Church’s minister, and thus the sacrament of penance is completed. In God’s design the humanity and loving kindness of our Savior have visibly

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<sup>118</sup> See *id.* at 411 tbl.5.33 (listing “[f]ines and restitution ordered in U.S. district courts for U.S. Sentencing Commission guideline cases”). Restitution and no fine were ordered in 17.2% of all cases. See *id.*

<sup>119</sup> See *id.* A sentence of restitution was imposed in 59.8% of robbery/breaking and entering and 62% of embezzlement convictions. See *id.*

<sup>120</sup> See *id.* Restitution was imposed in 30.7% and 40.5% of murder and manslaughter convictions, respectively. See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> Beckelheimer, *supra* note 72, at 23.

appeared to us, and God uses visible signs to give salvation and to renew the broken covenant.<sup>123</sup>

Absolution thus represents restitution in all its fullness; both the community and the penitent are made whole both apart from each other and, more importantly, in each other. The *Catechism* makes clear, however, that absolution—like rehabilitation itself—is an ongoing process: “Absolution takes away sin, but it does not remedy all the disorders sin has caused.”<sup>124</sup> Perhaps the biggest—and most problematic—way in which the criminal justice system expresses this reality is in the maintenance of the ex-offender’s record of arrests, charges, convictions, and sentences.

Consequently, even after he has “paid his debt to society” and is released from prison, the ex-offender must face the reality that his incarceration was only the payment of the principal on that debt. The interest, often steep, is paid whenever they attempt to take responsibility for their rehabilitation, e.g., when they apply for a job or when they try to enroll in educational or vocational programs. Like Coleridge’s doomed seaman, the ex-offender carries the albatross of his past misdeeds around his neck:

Like one, that on a lonesome road  
Doth walk in fear and dread,  
And having once turned round walks on,  
And turns no more his head;  
Because he knows, a frightful fiend  
Doth close behind him tread.<sup>125</sup>

As its Latin root suggests,<sup>126</sup> however, absolution invites not only the ex-offender to free himself through conversion, but also for society to free him. One must ask whether merely opening the prison door can itself achieve absolution. Probation and parole, in particular, were partly designed to assist the ex-offender in the process of his greater integration or reintegration into society. In discussing the impact of mandatory sentencing in

<sup>123</sup> *Rite of Penance*, *supra* note 44, ¶ 6(d), at 346.

<sup>124</sup> *CATECHISM*, *supra* note 39, ¶ 1459, at 366.

<sup>125</sup> SAMUEL TAYLOR COLERIDGE, *The Rime of the Ancient Mariner*, Part VI, ll, in *THE RIME OF THE ANCIENT MARINER AND OTHER POEMS* 446–51 (Penguin 1995).

<sup>126</sup> See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 4 (10th ed.1997). The word *absolve* comes from the Latin *ab* and *solvere*, which literally means “to loosen.” *Id.*

the nation's "War on Drugs," columnist William Raspberry has noted, however, that the burden of a record frustrates the process of absolution.

Whatever the initial intent of that disparate penalty [i.e., much higher mandatory sentences that have applied to possession of crack versus powder cocaine], the result has been devastating. Thousands of young men are in prison for needlessly long sentences. Their records make many of them virtually unemployable after they've served their time. And because they can't find decent work, many become more or less full-time criminals.<sup>127</sup>

A thought-provoking if not novel and limited response—one that has brought together figures as diverse as Harvard law professor Charles Ogletree,<sup>128</sup> former New York City Mayor Ed Koch,<sup>129</sup> and firebrand social activist Reverend Al Sharpton is<sup>130</sup>—the Second Chance program.

The idea is simple. Nonviolent drug offenders who have completed their sentences would be eligible to enroll in a program of drug treatment, education and job training, which, if they complete it and stay trouble-free for five years, would make them eligible to have their criminal records sealed. . . . The main benefit of sealing the record is that it permits a job applicant to answer "no" to the question: Have you ever been arrested and convicted of a crime?<sup>131</sup>

Those who argue against Second Chance and similar proposals might argue that the ex-offender, because of his offense, does not deserve any second chances, much less absolution. Others may concede, as Mr. Raspberry implicitly

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<sup>127</sup> William Raspberry, *Modest Proposal for a Second Chance*, WASH.POST, Nov.15, 1999, at A23.

<sup>128</sup> See *Harvard's Ogletree, Temple's Liacouras to Share Spotlight at Bar Meeting*, THE LEGAL INTELLIGENCER, May 31, 2000, at 2. Charles Ogletree is the Jesse Climenko Professor of Law at Harvard Law School. See *id.* Ogletree is an expert on criminal law. See *id.*

<sup>129</sup> See Dave Saltonstall, *Burying An Old Hatchet Ed & Rev. Al Find A Common Issue*, N.Y. DAILY NEWS, Dec.6, 1998, at 26. Ed Koch was elected mayor of New York City for three terms from 1978 to 1989. See *id.* Koch and Reverend Al Sharpton, long time political antagonists, came to find a common cause—the Second Chance Program. See *id.*

<sup>130</sup> See *id.*; see also *Al Sharpton's Mayoral Race*, N.Y. TIMES, Sept. 24, 1996, at A24. Al Sharpton is a well-known civil rights activist from New York. See *id.*

<sup>131</sup> Raspberry, *supra* note 127, at A23.

does, that such policies or programs are acceptable for ex-offenders whose crimes are nonviolent or less serious, but they “draw the line” against those who have been convicted of violent or other serious offenses.<sup>132</sup> Society, they argue, has not only the right but also the moral duty, based on principles of retribution and deterrence, to place a permanent mark on the offender. Though he may have “served his time,” others—from the victims who are scarred or even killed, to the society that must foot a mounting bill for the criminal justice system—continue to pay the price for his crimes.

These arguments appeal not only to perfectly justifiable emotions (e.g., compassion for victims) but also to our deep sense of justice. They become even more compelling as the crimes considered are more serious and the victims more numerous. In addition, it cannot be ignored that some criminals, by virtue of the heinous nature of their crimes and/or their psychological or moral incapacity (e.g., violent sociopaths), are either beyond rehabilitation, or their freedom places the rest of society at an unacceptable risk.<sup>133</sup>

The vast majority of those convicted of crimes, however, can and will be released back into society.<sup>134</sup> If the ex-offender's victims and society must continue to pay the price for his conduct, perhaps the question should be *what kind of price* the ex-offender should pay and whether those costs, both individually and in the aggregate, are purchasing the optimal amount of benefits. This requires a broader and deeper understanding of absolution.

As previously noted, the *Catechism* makes clear that, while absolution takes away sins, the effects of the sinner's wrongdoing can be both lingering and widespread.<sup>135</sup> This demands that he continue to pay a price for his sins, both for his own sake and for

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<sup>132</sup> See Hugh B. Price, *Stop the Cycle of Incarceration*, INDIANAPOLIS STAR, Feb. 27, 2000, at D4.

<sup>133</sup> See, e.g., Frank M. Ochberg, *Releasing Serial Killers; Quarantine Them Beyond Their Jail Terms*, WASH. POST, Dec. 5, 1999, at B3 (supporting statutes and processes that will facilitate the post-release civil commitment of offenders deemed, on the basis of clear and convincing evidence, to be “lethal predators,” i.e., those who: (1) have killed; (2) have a history of “repetitious, predatory acts” (those that are sadistic, ritualistic); and (3) have demonstrated “mental abnormality, usually a combination of sexual sadism and psychopathy”).

<sup>134</sup> See Price, *supra* note 132, at D4 (noting that every year approximately 500,000 prisoners are released and return to society).

<sup>135</sup> See *supra* note 124 and accompanying text.

the sake of others. "Raised up from sin, the sinner must still recover his full spiritual health by doing something more to make amends for the sin: he must 'make satisfaction for' or 'expiate' his sins. This satisfaction is also called 'penance.'"<sup>136</sup>

Programs like Second Chance do not simply let ex-offenders off "scot-free." They demand demonstrations of change not only professions of change.<sup>137</sup> In addition, they empower those who have taken from society to give back in forms as tangible as tax revenues and as intangible as becoming a functional parent.<sup>138</sup> They represent an interest payment on one's debt to society like the denial of job opportunities because of the existence of a criminal record. Unlike that payment, however, the interest paid by the participants in rehabilitative programs is an investment that will earn dividends that are both personal and societal.

Second Chance and similar programs deserve a chance to demonstrate their efficacy. The refusal, whether rationalized by justice or vengeance, to grant any form of absolution to those who have already undertaken their penance may ultimately leave those who have the power to grant it as fettered as those to whom it could be granted.

### CONCLUSION

The growth in state and federal prison populations is expected to continue. In 1995, for example, California had 134,718 prisoners in an adult system designed for 77,884; by 2002 that population is expected to swell to 250,115.<sup>139</sup> Similarly, the Federal Bureau of Prisons reported that 90,159 people were incarcerated in federal prisons; roughly twenty percent over capacity.<sup>140</sup> That population is expected to increase

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<sup>136</sup> CATECHISM, *supra* note 39, ¶ 1459, at 366.

<sup>137</sup> See *CNN Larry King Weekend* (CNN television broadcast, Jan. 22, 2000) (featuring a panel of guests who discussed crime and punishment in modern America). Harvard criminal law Professor Charles Ogletree advocates a program that seeks to give non-violent offenders "a second chance at life, to be able to come back to their communities, to be productive members of their family, to get jobs and to turn the community around." *Id.*

<sup>138</sup> See *id.*

<sup>139</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 5, at 487 tbl.6.34 (projecting state and federal prison populations for 1998, 2000, and 2002).

<sup>140</sup> See *id.* (indicating that the adult capacity of facilities in the Federal Bureau of Prisons system was 72,039 in 1995).



to 122,607 by 2002.<sup>141</sup> It is reasonable to expect that many, if not most, of those incarcerated will return to the communities from which they came, joining millions of others already under correctional supervision. Can they—as well as the communities that receive them—be more adequately prepared for their return?

Recovering the principle of rehabilitation through the model of the Sacrament of Penance and its elements of contrition, confession, penance, and absolution may help to provide an affirmative answer to that question. This recovery can both preserve all four of the traditional justifying principles of punishment and create new ones. It can temper the need for retribution with compassion. It can restore rehabilitation and advance it to another level: the reintegration of self, and in turn, that renewed self into the community. It can complement deterrence, which entails the avoidance of destructive conduct, with hope, which impels one to embrace constructive conduct. It can utilize a time designed in part for incapacitation for actually building capacity, both directly in the offenders and indirectly in the communities to which they will one day return.

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<sup>141</sup> *See id.*